

IN THE SUPREME COURT OF MISSOURI

LEBANON SCHOOL DISTRICT R-III,)	
)	
Relator,)	
)	
v.)	Appeal No.: SC86873
)	
HON. LARRY WINFREY)	
Presiding Judge,)	
Missouri Associate Circuit Court,)	
Twenty-Sixth Judicial Circuit,)	
Laclede County,)	
)	
Respondent.)	

ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY RULE IN PROHIBITION FROM THE SUPREME COURT OF MISSOURI
TO THE HONORABLE LARRY WINFREY, PRESIDING JUDGE OF THE ASSOCIATE CIRCUIT
COURT OF LACLEDE COUNTY

BRIEF OF RELATOR

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
JURISDICTIONAL STATEMENT	7
STATEMENT OF FACTS	8
POINTS RELIED ON	10
STANDARD OF REVIEW	14
ARGUMENT	15

I. Lebanon School District is entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiff's Motion for Change of Venue, because venue is proper only in Laclede County, in that:

- A. RSMo. § 508.050 governs venue for suits brought against school districts;
- B. RSMo. §508.050 requires school districts to only be sued in the county in which it is situated;
- C. Here, Lebanon School District is situated in Laclede County;
- D. Rule 51.03 cannot later be used to undermine RSMo. § 508.050.

II. Lebanon School District is entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiff's Motion for Change of Venue, because the motion was barred under Rule 51.03, in

that:

- A. Rule 51.03 requires parties to file a motion for change of venue within ten days after the answer is due;
- B. Rule 51.03's time limit runs from the first answer date;
- C. Plaintiff's Motion for Change of Venue was filed more than ten days after Lebanon School District's Answer was due and Co-Defendant Lackey filed his Motion to Dismiss;
- D. Co-Defendant Lackey's Motion to Dismiss qualifies as an answer for the purpose of the timing requirements under Rule 51.03.

CONCLUSION	26
AFFIDAVIT OF SERVICE	27
CERTIFICATE OF COMPLIANCE	28
APPENDIX	29

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Bizzell v. Kodner Development Corp.,</i> 700 S.W.2d 819 (Mo. banc. 1985)	19
<i>Browder v. Milla,</i> 296 S.W.2d 502 (Mo. App. 1956)	16
<i>Hefner v. Dausmann,</i> 996 S.W.2d 660 (Mo. App. 1999)	18
<i>Marshall v. Kansas City,</i> 355 S.W.2d 877 (Mo. App. 1962)	16
<i>McPherson v. U.S. Physicians Mut. Risk Retention Group,</i> 99 S.W.3d 462 (Mo. App. 2003)	24
<i>Rohde v. TRW Real Estates,</i> 836 S.W.2d 465 (Mo. App. 1991)	22
<i>State ex rel. Allen v. Barker,</i> 581 S.W.2d 818 (Mo. banc 1979)	14
<i>State ex rel. Burlington Northern R. Co. v. Forder,</i> 787 S.W.2d 725 (Mo. banc. 1990)	18, 19
<i>State ex rel. City of Bella Villa v. Nicholls,</i> 698 S.W.2d 44 (Mo. App. 1985)	16, 17

<i>State ex. rel. City of Springfield v. Crouch,</i>	
687 S.W.2d 639 (Mo. App. 1985)	16, 17
<i>State ex rel. City of St. Louis v. Kinder,</i>	
698 S.W.2d 4 (Mo. banc 1985)	14
<i>State ex rel. East Carter County R-II School District v. Heller,</i>	
977 S.W.2d 958 (Mo. App. 1998)	21
<i>State ex. rel Horton v. House,</i>	
646 S.W.2d 91 (Mo. banc. 1983)	24
<i>State ex rel. Linthicum v. Calvin,</i>	
57 S.W.3d 855 (Mo. banc 2001)	14
<i>State ex rel. McDonnell Douglas Corp. v. Gaertner,</i>	
601 S.W.2d 295 (Mo. App. E.D. 1980)	14
<i>State ex rel. Milham v. Rickoff,</i>	
633 S.W.2d 733 (Mo. banc 1982)	12
<i>State ex rel. O’Blennis v. Adolf,</i>	
691 S.W.2d 498 (Mo. App. E.D. 1985)	14
<i>State ex rel. Police Retirement System of St. Louis v. Mummert,</i>	
875 S.W.2d 553 (Mo. banc 1994)	14
<i>State ex rel. Rothermich v. Gallagher,</i>	
816 S.W.2d 194 (Mo. Banc 1991)	16
<i>State ex rel. Santoya v. Edwards,</i>	
879 S.W.2d 775 (Mo. App. 1994)	16, 17

State ex rel. Turnbough v. Gaertner,

589 S.W.2d 290 (Mo. banc. 1979)

17

Other Authorities:

RSMo. § 508.050

passim

Missouri Rule of Civil Procedure 51.01

17, 18

Missouri Rule of Civil Procedure 51.03

passim

Missouri Rule of Civil Procedure 55.25

22, 23

U.S. Department of Census 2004 Estimate

18

JURISDICTIONAL STATEMENT

Relator Lebanon School District R-III brought this original proceeding in prohibition to challenge an order entered by Respondent granting Plaintiff's Motion for Change of Venue for the pending case of *Amanda Slover, by and through her mother and next friend, Tina Wilmouth v. Lebanon School District R-III, et al.*, Case No. CV304-1758CC.

Lebanon School District is located in Laclede County. Plaintiff filed her Petition in Laclede County. Then she attempted to transfer venue from Laclede County contrary to the controlling statute preventing a municipal corporation from being sued outside the county in which it is situated and despite a motion that was filed after the time required by the rules had run.

The Court has jurisdiction because it issued a Preliminary Writ of Prohibition on June 21, 2005. Under Article V, Section 4 of the Missouri Constitution, the Court has authority to determine and issue remedial writs.

STATEMENT OF FACTS

This original proceeding in prohibition arises from *Amanda Slover, by and through her mother and next friend, Tina Wilmouth v. Lebanon School District R-III and Jeff Lackey*, Case No. CV304-1758CC, a personal injury case. Amanda Slover alleges she was injured when she fell from a set of risers that collapsed during a choir performance at Lebanon Junior High School. (A2) She further alleges Jeff Lackey was the teacher who installed and erected the risers. (A3)

A school district is a municipal corporation for purposes of the venue statute. RSMo. § 508.050, which governs suits brought against school districts, provides:

[s]uits against municipal corporations as defendant or codefendant **shall be commenced only in the county in which the municipal corporation is situated** except that suits may be brought against a city containing more than four hundred thousand inhabitants in any county in which any part of the city is situated. (Emphasis added.) (A21)

On November 18, 2004, Plaintiff filed her Petition in the Circuit Court of Laclede County. (A1) Lebanon School District is situated in Laclede County. (A6) On January 21, 2005, Lebanon School District filed its Answer. (A6) On February 11, 2005, Co-Defendant Lackey filed a Motion to Dismiss in lieu of an answer. (A10) Plaintiff did not file her Motion for Change of Venue until March 16, 2005. (A12)

Rule 51.03, which controls the filing of a change of venue states, in pertinent part:

A change of venue shall be ordered in a civil action triable by jury that is pending in a county having seventy-five thousand or less inhabitants upon the filing of a written application therefore **not later than ten days after answer is due to be filed.** (Emphasis added.) (A23)

Respondent granted Plaintiff's Motion for Change of Venue. (A19) The Southern District of the Missouri Court of Appeals later summarily denied Relator's Petition for Writ of Prohibition on May 25, 2005. (A20) This original proceeding in prohibition followed.

POINTS RELIED ON

I. Lebanon School District is entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiff's Motion for Change of Venue, because venue is proper only in Laclede County, in that:

- A. RSMo. § 508.050 governs venue for suits brought against school districts;
- B. RSMo. §508.050 requires school districts to only be sued in the county in which it is situated;
- C. Here, Lebanon School District is situated in Laclede County;
- D. Rule 51.03 cannot later be used to undermine RSMO §508.050.
 - 1. Introduction.
 - 2. Suit must be brought in Laclede County under RSMo. §508.050, therefore, an attempt to transfer out of the proper venue is not permitted.
 - 3. Missouri Rules of Civil Procedure do not limit the purpose of RSMo. § 508.050.
 - 4. Conclusion.

Bizzell v. Kodner Development Corp., 700 S.W.2d 819 (Mo. banc. 1985)

Browder v. Milla, 296 S.W.2d 502 (Mo. App. 1956)

Hefner v. Dausmann, 996 S.W.2d 660 (Mo. App. 1999)

Marshall v. Kansas City, 355 S.W.2d 877 (Mo. App. 1962)

State ex rel. Burlington Northern R. Co. v. Forder, 787 S.W.2d 725 (Mo. banc. 1990)

State ex rel. City of Bella Villa v. Nicholls, 698 S.W.2d 44 (Mo. App. 1985)

State ex. rel. City of Springfield v. Crouch, 687 S.W.2d 639 (Mo. App. 1985)

State ex rel. Milham v. Rickoff, 633 S.W.2d 733 (Mo. banc 1982)

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. Banc 1991)

State ex rel. Santoya v. Edwards, 879 S.W.2d 775 (Mo. App. 1994)

State ex rel. Turnbough v. Gaertner, 589 S.W.2d 290 (Mo. banc. 1979)

RSMo. §508.050

Missouri Rule of Civil Procedure 51.01

Missouri Rule of Civil Procedure 51.03

U.S. Department of Census 2004 Estimate

POINTS RELIED ON

II. Lebanon School District is entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiff's Motion for Change of Venue, because the motion was barred under Rule 51.03, in that:

- A. Rule 51.03 requires parties to file a motion for change of venue within ten days after the answer is due;
- B. Rule 51.03's time limit runs from the first answer date;
- C. Plaintiff's Motion for Change of Venue was filed more than ten days after Lebanon School District's Answer was due to be filed and Co-defendant Lackey filed his Motion to Dismiss;
- D. Co-Defendant Lackey's Motion to Dismiss qualifies as an answer for the purpose of the timing requirements under Rule 51.03.
 - 1. Introduction.
 - 2. Plaintiff's Motion for Change of Venue is barred because it was filed more than ten days after Lebanon School District's Answer was due.
 - 3. Alternatively, Plaintiff's Motion for Change of Venue is barred because it was filed more than ten days after Co-Defendant filed his Motion to Dismiss.
 - 4. Conclusion.

McPherson v. U.S. Physicians Mut. Risk Retention Group, 99 S.W.3d 462 (Mo. App. 2003)

Ott v. Bonacker, 791 S.W.2d 494 (Mo. App. 1990)

Rohde v. TRW Real Estates, 836 S.W.2d 465 (Mo. App. 1991)

State ex rel. East Carter County R-II School District v. Heller, 977 S.W.2d 958 (Mo. App. 1998)

State ex. rel Horton v. House, 646 S.W.2d 91, 93 (Mo. banc. 1983)

RSMo § 508.050

Missouri Rule of Civil Procedure 51.03

Missouri Rule of Civil Procedure 55.25

STANDARD OF REVIEW

Prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001). Prohibition is a discretionary writ. The writ will issue “to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power.” *Id.*

The writ is available to avoid useless lawsuits and to afford relief at the earliest possible moment in the litigation. *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo. App. E.D. 1980). Prohibition “may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *State ex rel. Lithicum*, 57 S.W.3d at 857. The writ should issue where the trial court wrongly decides a matter of law where the facts are uncontested, and thus deprives a party of an absolute defense. *State ex rel. Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555-56 (Mo. banc 1994); *State ex rel. O’Blennis v. Adolf*, 691 S.W.2d 498, 500 (Mo. App. E.D. 1985).

Lack of venue is a jurisdictional defect that authorizes issuing a writ of prohibition *State ex rel. City of St. Louis v. Kinder*, 698 S.W.2d 4, 6 (Mo. banc 1985); *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 824 (Mo. banc 1979).

ARGUMENT

I. Lebanon School District is entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiff's Motion for Change of Venue, because venue is proper only in Laclede County, in that:

- A. RSMo. § 508.050 governs venue for suits brought against school districts;**
- B. RSMo. §508.050 requires school districts to only be sued in the county in which it is situated;**
- C. Here, Lebanon School District is situated in Laclede County;**
- D. Rule 51.03 cannot later be used to undermine RSMO §508.050.**

1. Introduction

The question presented by this original proceeding in prohibition is if a plaintiff can undermine RSMo. §508.050 by immediately requesting a change of venue. Plaintiff filed her Petition in Laclede County because it was the proper county to sue the Lebanon School District. Yet Plaintiff is seeking to transfer from Laclede County using Rule 51.03 to nullify the requirements of RSMo. §508.050.

Case law, statutory authority, and public policy limit a municipal corporation's venue to the county in which it is situated. As a matter of law, Plaintiffs cannot pretensively file suit in Laclede County then attempt to transfer to another forum.

- ### **2. Suit must be brought in Laclede County under RSMo. §508.050, therefore, an attempt to transfer out of the proper venue is not permitted.**

A school district is a municipal corporation for purposes of the venue statute. *State ex rel. Milham v. Rickoff*, 633 S.W.2d 733, 735-36 (Mo. banc 1982); *State ex rel. Santoya v. Edwards*, 879 S.W.2d 775 (Mo. App. 1994). RSMo. § 508.050, relating to suits brought against municipal corporations, is a special venue statute; thus, it is controlling over RSMo. § 508.010, which is the general venue statute. *State ex rel. City of Bella Villa v. Nicholls*, 698 S.W.2d 44 (Mo. App. 1985). RSMo. § 508.050, states, in pertinent part:

[s]uits against municipal corporations as defendant or codefendant **shall be commenced only in the county in which the municipal corporation is situated** except that suits may be brought against a city containing more than four hundred thousand inhabitants in any county in which any part of the city is situated. (Emphasis added.)

Venue in Missouri is determined solely by statute. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 196 (Mo. Banc 1991). The right to change of venue is not a constitutional right, it is a statutory privilege that does not exist except as provided by statute. *Browder v. Milla*, 296 S.W.2d 502 (Mo. App. 1956).

There are significant statutory purposes for prohibiting a municipal corporation from being sued outside its county of residence. Consider, *Marshall v. Kansas City*, 355 S.W.2d 877, 883 (Mo. App. 1962), which held that a municipal corporation is similar to a “miniature state within its locality and as an instrumentality of the state established for the convenient administration of local government.” It also avoids the necessity of local officials having to defend suits in courts across the state. *State ex. rel. City of Springfield*

v. Crouch, 687 S.W.2d 639 (Mo. App. 1985). The legislative intent of RSMo. § 508.050 is clear from the statute’s unambiguous language. *State ex. rel. City of Bella Villa v. Nicholls*, 698 S.W.2d 44 (Mo. App. 1985).

RSMo. § 508.050, **limits** the counties where a municipal corporation can be sued. The purpose of the statute is analogous to preventing Missouri from being sued in a court in Alaska. The policy behind such a limitation is because a municipal corporation does not conduct business outside of the county in which it is situated and should not be subject to defending suits in courts across the state. Conversely, the venue statutes for a corporation, railroad, or motor carrier **expands** the counties where suit may be brought.

3. Missouri Rules of Civil Procedure do not limit the purpose of RSMo. § 508.050.

Plaintiff argued that Rule 51.03 superceded and governed the RSMo. §508.050 venue limitation protecting the Lebanon School District. Lebanon School District concedes that a procedural rule supercedes any inconsistent statute unless annulled or amended by a later legislative enactment. However, Plaintiff misunderstands the appropriate application of the Missouri Rules of Civil Procedure.

Rule 51.01 states that the Rules of Civil Procedure “shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein.” Rule 51.01 also observes that venue shall not to be established by the Rules of Civil Procedure. *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290 (Mo. banc. 1979).

The case law states that venue is determined at the time the lawsuit is initiated. *State ex rel. Santoya v. Edwards*, 879 S.W.2d 775 (Mo. App. 1994). It also states “if

venue is properly in the court where the cause of action was brought, steps taken by that court to transfer the cause are void.” *Hefner v. Dausmann*, 996 S.W.2d 660, 663 (Mo. App. 1999).

Here, it is undisputed that Plaintiff had to file suit against Lebanon School District in Laclede County. Nevertheless, assuming Rule 51.03 applied in this matter, it would directly contradict the limitations of Rule 51.01 because it would extend venue against a school district by forcing it to defend matters throughout the state.

The application of Rule 51.03 against municipal corporations would also void the purpose of RSMo. § 508.050. Under Plaintiff’s theory, she could create an alternative venue despite the legislature’s venue restriction for lawsuits against municipal corporations. According to the U.S. Department of Census 2004 Estimate, only 13 of the 115 counties throughout Missouri contain more than 75,000 inhabitants. Contrary to the statutory purpose of RSMo. § 508.050, more than 100 school districts, cities, and other public entities would become subject to defending lawsuits throughout Missouri based on Respondent’s decision.

Based on the statutory purpose of RSMo. § 508.050 prohibiting a school district from being sued outside the county it resides, Lebanon School District has found no case law which allows a municipal corporation’s venue to be transferred pursuant to Rule 51.03. On this point, consider *State ex rel. Burlington Northern R. Co. v. Forder*, 787 S.W.2d 725 (Mo. banc. 1990). There, the defendant attempted to file a third-party petition seeking indemnification and contribution against a Marion County municipal corporation in the City of St. Louis. *Id.* at 726. The Court held that municipal

corporations could not be brought into a venue other than that in which it was situated based upon RSMo. § 508.050. *Id.* The Court, in discussing the public policy of protecting a municipal corporation's local interests, noted that they "enjoy a special status with respect to lawsuits against them" *Id.*

The *Burlington Northern* Court further distinguished and limited *Bizzell v. Kodner Development Corp.*, 700 S.W.2d 819 (Mo. banc. 1985) to its facts. In *Bizzell*, venue had been properly transferred to another venue before the municipal corporation was joined as an additional defendant. *Id.* at 821. The Court denied the municipal corporations motion asserting improper venue by noting that it did not raise the issue until six months after its Answer was filed. *Id.* at 822. The court also described the *Bizzell* holding as a "unique" situation. *Burlington Northern* 787 S.W.2d at 727.

Based on *Burlington Northern*, venue must remain in Laclede County. Under RSMo. § 508.050, Laclede County is the only venue Lebanon School District may be sued. Lebanon School District filed a memorandum opposing Plaintiff's attempt to transfer venue to a county outside of Laclede County. The *Burlington Northern* analysis and reasoning sets forth that a transfer is not permitted against Lebanon School District.

4. Conclusion

Under RSMo. § 508.050, the proper venue for lawsuit against a school district is the county where it is situated. Here, Lebanon School District may only be sued in Laclede County. Since venue is only proper in Laclede County, Plaintiff's attempt to transfer to another county is barred because it violates case law, statutory authority, and public policy.

- II. Lebanon School District is entitled to an order prohibiting Respondent from taking any action other than overruling Plaintiff's Motion for Change of Venue, because the motion was barred under Rule 51.03, in that:**
- A. Rule 51.03 requires parties to file a motion for change of venue within ten days after the answer is due;**
 - B. Rule 51.03's time limit runs from the first answer date;**
 - C. Plaintiff's Motion for Change of Venue was filed more than ten days after Lebanon School District's Answer was due to be filed and Co-defendant Lackey filed his Motion to Dismiss;**
 - D. Co-Defendant Lackey's Motion to Dismiss qualifies as an answer for the purpose of the timing requirements under Rule 51.03.**

1. Introduction

Even if Plaintiff could change venue from Laclede County, despite RSMo § 508.050, the second question presented by this original proceeding in prohibition is whether Rule 51.03's timeliness requirement begins to run from the first answer date when there are multiple defendants and whether a motion to dismiss in lieu of an answer acts as a stay in determining when Rule 51.03 applies.

Plaintiff filed her Petition in Laclede County because it was the proper venue to sue the Lebanon School District. Yet Plaintiff seeks to transfer from Laclede County under Rule 51.03, which allows a venue change unless it is "not later than ten days after answer is due to be filed." A change of venue under Rule 51.03 is not allowed in this matter as explained in Part I as it would extend venue against Lebanon School District.

Moreover, Plaintiff filed her motion nearly sixty days after Lebanon School District's Answer was filed and more than ten days after Co-Defendant Lackey filed his Motion to Dismiss.

Plaintiff's motion is barred because Lebanon School District's Answer, which was filed nearly sixty days prior to Plaintiff's motion, controls the timeliness requirement under Rule 51.03. Additionally, Co-Defendant Lackey's Motion to Dismiss did not act as a stay to determine when his answer was due.

2. Plaintiff's Motion for Change of Venue is barred because it was filed more than ten days after Lebanon School District's Answer was due.

Plaintiff's Motion for Change of Venue is barred because it was not timely filed. Plaintiff cited Rule 51.03 for transferring venue from Laclede County, which states that a motion shall be filed "not later than ten days after an answer is due to be filed."

On this point, consider *State ex rel. East Carter County R-II School District v. Heller*, 977 S.W.2d 958 (Mo. App. 1998). There, plaintiff requested a change of venue more than two weeks after the school district's answer was due to be filed. The school district filed an objection to the motion stating it was untimely. The court agreed and held plaintiff's Motion for Change of Venue was not timely under Rule 51.03 because it was filed more than ten days after the school district's Answer was due to be filed.

Rule 51.03's timeliness requirement is calculated from the time the Answer is due. Importantly, Rule 51.03 is not based on the time when the Answer is actually filed. Rule

55.25(a) addresses the time for filing of pleadings. It states that a defendant “shall file an answer within thirty days after the service of the summons and petition...”

Under Rule 51.03, Plaintiff had ten days after Lebanon School District’s or Co-Defendant Lackey’s Answer was due to be filed. Lebanon School District’s Answer was due on January 20, 2005. (Lebanon School District’s Answer was mailed on January 19, 2005 and filed on January 21, 2005.) Co-Defendant Lackey’s Answer was due on February 17, 2005. Plaintiff’s Motion for Change of Venue was not filed until March 16, 2005. Based on Rule 55.25(a), Plaintiff’s request to transfer from Laclede County was filed more than ten days after both Defendants’ Answers were due to be filed.

Plaintiff argues that the time requirement under Rule 51.03 does not begin until both of the Defendants filed their Answers. In support, Plaintiff cites *Rohde v. TRW Real Estates*, 836 S.W.2d 465 (Mo. App. 1991). There, the court noted that three of the parties were not before the court, therefore, the court lacked jurisdiction because necessary parties had not been served with process. The court found that the time to file a Motion for Change of Judge did not begin until all of the parties to the suit were properly before the court. The *Rohde* holding has no application to this matter. It does not discuss the timeliness requirement under Rule 51.03 when there are multiple defendants. Unlike *Rohde*, it is undisputed that Lebanon School District and Co-Defendant Lackey were properly before the court.

Under Plaintiff’s theory, she would be able to transfer this matter to another venue at anytime by simply joining an additional defendant. Justice and fairness would not be served if a plaintiff was entitled to a change of venue based on the timeliness of each

separate defendant's response. Based on the foregoing, Plaintiff's attempt to transfer from Laclede County is barred under 51.03 because it was not timely.

3. Alternatively, Plaintiff's Motion for Change of Venue is barred because it was filed more than ten days after Co-Defendant filed his Motion to Dismiss.

It is undisputed that Plaintiff's motion was not timely filed as to Lebanon School District. Plaintiff argues that her motion was timely, despite Lebanon School District's Answer being filed nearly sixty days prior to Plaintiff's motion, because Co-Defendant Lackey filed a Motion to Dismiss in lieu of an Answer.

Rule 51.03 bars a transfer of venue unless the motion is filed not later than ten days after answer is **due to be filed**. (Emphasis added.) Rule 55.25(a) states that an answer is due within thirty days after service.

Rule 55.25(c) allows the time for filing a motion to dismiss to alter the time for filing a required responsive pleading. However, Rule 55.25(c) does not apply to this case. Rule 51.03 is not concerned with when an answer is actually filed, but when it is due. Arguably, had the committee intended to extend Rule 51.03 for an indefinite amount of time it would have permitted a motion to be filed after an answer "is filed." Instead, Rule 51.03 is limited to be filed after an answer is "due to be filed."

Co-Defendant Lackey timely filed a Motion to Dismiss in lieu of an Answer on February 11, 2005. Plaintiff's Motion for Change of Venue was not filed until March 16, 2005. Based on Rule 51.03, Plaintiff's request to transfer out of Laclede County was filed more than ten days after Co-Defendant Lackey's Answer was due to be filed.

It is not uncommon for a defendant to file a Motion to Dismiss in lieu of an Answer, which may not be ruled upon until shortly before trial. Under Plaintiff's theory, venue could be transferred at anytime throughout litigation as long as the motion was not ruled upon.

Plaintiff relies on *Ott v. Bonacker*, 791 S.W.2d 494 (Mo. App. 1990). There, defendant's motion to dismiss was denied. The court still allowed the defendant an additional forty days to file a Motion for Change of Judge. *Ott* is distinguishable from this issue. Here, Co-Defendant Lackey filed a Motion to Dismiss while Plaintiff filed a Motion for Change of Venue. Unlike *Ott*, the same party is not attempting to file both motions. *Ott* does not address the timeliness requirement under Rule 51.03. Further, neither of the parties involved were municipal corporations, which are afforded special protections under RSMo. §508.050 by preventing it from being sued outside the county it is situated.

Unlike *Ott*, this matter does not relate to a change of judge. A Motion for Change of Judge (Rule 51.05), unlike a Motion for Change of Venue, is a "keystone to our judicial system." *State ex. rel Horton v. House*, 646 S.W.2d 91, 93 (Mo. banc. 1983). Courts have adopted a liberal construction of the right to disqualify a judge to maintain public confidence in the integrity of the judicial system. *McPherson v. U.S. Physicians Mut. Risk Retention Group*, 99 S.W.3d 462 (Mo. App. 2003). Therefore, the change of judge rule should be granted more generously than the venue rules. Based on the foregoing, this matter is unrelated to the *Ott* holding and rationale.

As a matter of law, Plaintiff's motion was not timely filed as required by Rule 51.03. Therefore, Plaintiff's Motion to Change of Venue should have been overruled.

4. Conclusion

When the case law and statutory authority is examined along with the facts, the issues can be construed only one way. As Plaintiff filed her Motion for Change of Venue more than ten days after Lebanon School District's Answer was due it was not timely. Additionally, Co-Defendant Lackey's Motion to Dismiss in lieu of an answer did not extend Rule 51.03's timeliness requirement. Therefore, Plaintiff's motion was barred as a matter of law.

CONCLUSION

WHEREFORE Relator Lebanon School District R-III respectfully requests the Court to make permanent the preliminary writ of prohibition and to direct Respondent to overrule Plaintiffs' Motion for Change of Venue, in *Amanda Slover, by and through her mother and next friend, Tina Wilmouth v. Lebanon School District R-III, et al.*, Case No. CV304-1758CC.

Respectfully submitted,

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Lawrence B. Grebel	# 26400
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Subscribed and sworn to before me this _____ day of September, 2005.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Relator's Brief contains approximately 3,884 words, and that the computer disk filed with Relator's Brief under Rule 84.06 has been scanned for viruses and is virus-free.

Lawrence B. Grebel	# 26400
Joshua D. Margolis	#56041

APPENDIX